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No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1985

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IN RE

ANGEL M. COSME NIEVES, SECUNDINO MACHADO, TOMAS GARCIA, AND LORRAINE GORSKI,

*Petitioners*

v.

COL. ROBERT C. DESHLER, C.O. FORT BUCHANAN, COL. CLARENCE H. WOLLIVER, C.O. FORT McPHERSON, GA., INSTALLATION CLUB SYSTEM, NON-COMMISSIONED OFFICERS' OPEN MESS, AND/OR COMMUNITY CLUB, Sub-divisions of the INSTALLATION CLUB SYSTEM, Fort Buchanan, Puerto Rico,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## QUESTIONS PRESENTED

A. Whether the conflict created by the decision given in this case by the Honorable Court of Appeals of the First Circuit, affirming removal of the case from the Superior Court, San Juan Part, of Puerto Rico to the United States District Court for the District of Puerto Rico, filed thereat under Fair Labor Standards Act of 1938, as amended, (FLSA) 29 U.S.C. 201 *et seq.* is to be dissolved or is it to prevail over the longstanding doctrine of *Johnson v. Butler Brothers,* 162 F.2d 87 (8th Cir., 1947), which prohibits such removals.

B. Whether or not the erroneous interpretation of the laws of Puerto Rico, tantamount to legislating for the Commonwealth, by the United States Court of Appeals for the First Circuit should prevail in the face of the preemption doctrine protecting Section 218(a) of the FLSA.

C. Whether the "most beneficial" clause of Section 218(a) of the FLSA is to preempt or not dispositions of Title 29 Laws of Puerto Rico, Section 246e(a)(2), which make inapplicable "most beneficial" state laws to employees of nonappropriated fund instrumentalities (NAFIs) of the federal government in the light of Congressional waiver of immunity since the 1966 and 1974 Amendments to the FLSA and the case of *Joe G. Garcia v. San Antonio Metropolitan Transit Authority, et al.,* 53 LAW WEEK 4135, February 19,1985, 105 S. Ct. 1005 (1985).

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A. The decision rendered by the Court of Appeals of the First Circuit in this case in the matter of removal of cases under the FLSA to the federal district courts *is in conflict* with the decision rendered by the Court of Appeals of the Eighth Circuit on June 11, 1947 in the case of *Johnson v. Butler Brothers,* 162 F.2d 87 ..... 13

B. The United States Court of Appeals for the First Circuit has decided an important question of federal law, that is, application of the "most benficial" laws of Puerto Rico, authorized under Section 218(a) of the FLSA, to the nonappropriated fund instrumentalities of the Armed Services (NAFIs), in a manner detrimental to the public policy of Section 202, and against the "most benefiical" clause of Section 218(a) of the FLSA, and in violation of Clause 2, Article IV of the Constitution of the United States. Further, the matter has been decided against the constitutional principle of separation of branches and against the principle of deference to the legislative branch of the Commonwealth of Puerto Rico. These matters have not been, but should be settled by this Court ..... 21

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COL. ROBERT C. DESHLER, C.O. FORT BUCHANAN, COL. CLARENCE H. WOLLIVER, C.O. FORT McPHERSON, GA., INSTALLATION CLUB SYSTEM, NON-COMMISSIONED OFFICERS' OPEN MESS, AND/OR COMMUNITY CLUB, Sub-divisions of the INSTALLATION CLUB SYSTEM, Fort Buchanan, Puerto Rico,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## OPINION BELOW

The petitioners ANGEL M. COSME NIEVES, *et al.*, filed claim in the State Court of competent jurisdiction against respondents under the FLSA and under the "more beneficial" laws of the Commonwealth of Puerto Rico. (App. 1a) The case was removed to the United States District Court for the District of Puerto Rico. The following orders are pertinent to the case:

a. Complaint, PE 82-1381, October 9, 1982 under the Fair Labor Standards Act (FLSA), (App. 1a)

b. Opinion and Order, U.S. District Court for the District of Puerto Rico, April 15, 1983. (App. 9a) (561 F. Supp. 1173)

c. Order of the Court, United States Court of Appeals for the First Circuit, August 22, 1983. (App. 13a)

d. Memorandum and Order, United States Court of Appeals for the First Circuit, October 7, 1983. (App. 14a)

e. Opinion and Order, U.S. District Court for the District of Puerto Rico, January 8, 1985. (App. 15a) (601 F. Supp. 100)

f. Judgment, U.S. District Court for the District of Puerto Rico, January 14, 1985. (App. 23a)

g. Decision on Appeal, United States Court of Appeals for the First Circuit, March 18, 1986. (App. 24a)

h. Judgment, U.S. Court of Appeals for the First Circuit, March 18, 1986. (App. 42a)

The United States Court of Appeals for the First Circuit (USCA-1C) held that "it was error for the district court to dismiss on the ground that plaintiffs were obliged to have brought this action in the Claims Court against the United States." The Appeals Court further held "that plaintiffs are entitled to proceed in the district court against their immediate employer, the NAFI itself. The USCA-1C, however, held against the plaintiffs that "the case was properly removed pursuant to 28 U.S.C. 1441," (App. 37a) and further dismissed plaintiffs claims brought under Section 218(a) of the FLSA and the laws of Puerto Rico, (App. 42a), but directed the district court to address the merits of plaintiffs' claim under Section 218(b)(2) of the FLSA, (App. 41a).

## JURISDICTION

a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1), 2101(c) and under Rule 19, paragraph 1(a) and (b) of the Supreme Court Rules, 28 U.S.C. Rule 19.

b. The USCA-1C exercised its jurisdiction under 28 U.S.C. 2107.

c. The Opinion and Order and the judgment of the USCA-1C is dated March 18, 1986 and this petition is filed within the ninety (90) days authorized by law.

## STATUTORY PROVISIONS INVOLVED

**a. United States Code, Title 29.**

**Section 216**

(a) Penalties; civil and criminal liability; injunction proceeding terminating right of action; waiver of claims; actions by Secretary of Labor; limitations of actions; savings provision.

(b) Any employer who violates the provisions of 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of Section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropraite to effectuate the purposes of section 215(a)(3) of this title, shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal

amount as liquidated damages. *An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.* No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such party and such consent is filed in the court in which such action is brought. *The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow reasonable attorney's fee to be paid by the defendant, and costs of the action.* (Emphasis furnished).

**Section 218** Relation to other laws.

(a) *No provisions of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter* and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or to justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Chapter. * * * (Emphasis furnished)

(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this titte) or any other law –

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate, provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

**Section 203(d)** Definitions

As used in this Chapter.

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

1966 Amendment. Subsec. (d) Pub.L. 89-601, section 102(b), expanded the definition of employer to include a state or a political subdivision thereof with respect to employees in a hospital, institution, or school referred to in the last sentence of subsec. (r) of this section, or in the

operation of a railway or carrier referred to in such sentence.

**b. United States Code, Title 28.**

**Section 1331** Federal Question (As of June 25, 1984)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Federal Question (As of February 4, 1983)

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**Section 1337** Commerce and anti-trust regulations (As of June 25, 1948)

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Commerce and antitrust regulations; amount in controversy, costs (As of February 4, 1983)

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. Provided, however, that the district courts shall have original jurisdiction of an action brought under section 1717 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and cots.

(b)

(c)

**Section 1441** Actions removable generally (As of June 25, 1948)

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c)

Actions removable generally (As of February 4, 1983)

(a) Substantially identical to corresponding section in effect June 25, 1948.

(b) *Id.*

(c)

(d)

**c. Laws of the Commonwealth of Puerto Rico, Title 29.**

**Section 273** Extra hours

Extra hours of work are:

(a) The hours that an employee works for his employer in excess of eight hours during any period of twenty-four consecutive hours;

(b) The hours that an employee works for his employer in excess of forty hours during any week, unless the hours worked daily in excess of eight are paid at double rate;

(c) The hours that an employee works for his employer in excess of the hours stipulated by the Secretary of Labor in the public notice he shall give according to section 272 of this title;

(d) The hours that an employee works for his employer during the days or hours when the establishment in which he renders services should remain closed to the public by provision of law; Provided, however, That the hours worked by an employee in the service of his employer during the days or hours in which the establishment

must remain closed to the public shall not be considered extra hours of work, when the employer has obtained from the Secretary of Labor the permit required by sections 289 and 290 of this title, and the total number of hours worked by the employee during said day does not exceed eight hours, and the total number of hours worked during the week does not exceed forty hours;

(e) The hours that an employee works for his employer during the day of rest heretofore or hereafter fixed by law in the case of businesses and industries not subject to the closing of their establishments;

(f) The hours that an employee works for his employer in excess of such maximum working hours a day as the Minimum Wage Board may have fixed or may fix for the occupation, business, or industry in question;

(g) The hours that an employee works for his employer in excess of the maximum number of working hours a day fixed in a collective labor agreement.

**Section 283** Posting notice of work hours; printed models

Every employer. . .

When the employees. . .

The period assigned for taking food should commence not before the conclusion of the third, nor after the commencement of the sixth consecutive hour of work, so that at no time would the employees be required to work more than

five consecutive hours without pausing in their duties to take food.

Every employer who employs or permits an employee to work during the period fixed for taking food, shall be bound to pay for said period or fraction thereof at a wage rate equal to double the rate agreed upon for regular hours. In such cases where. . .

**Section 274** Extra wages for extra hours

Every employer who employs or permits an employee to work during extra hours shall be obliged to pay him for each extra hour a wage rate equal to double the rate agreed upon for regular hours; *Provided,* however, That every employer in any *industry* in Puerto Rico covered by the provisions of the Fair Labor Standards Act enacted by thc Congress of the United States on June 25, 1938, as heretofore or hereafter amended, shall be under obligation to pay only for each hour of work in excess of the legal eight-hour working day, or in excess of forty (40) hours a week, a wage at the rate of not less than time and a half the rate of wage agreed upon for regular hours, save when by a decree of the Minimum Wage Board or by a collective labor agreement, other working and/or compensation standard is heretofore or hereafter fixed. To determine the wage rate agreed upon for regular hours of work, the daily, weekly, or monthly wages, or wages otherwise stipulated, shall be divided by the number of regular hours worked during the same period in accordance with the provisions of sections 271-278 of this title. (Emphasis supplied)

**Section 285** Occupations subject to law; Exceptions

The provisions of * * *

The provisions of * * *

The provisions of * * *

The provisions of sections 271-288 of this title shall not apply to the employees of the Commonwealth Government, of the municipal governments, of the Government of the Capital, or of the agencies or instrumentalities of said governments, excepting such agencies, and instrumentalities as are devoted to agricultural, industrial, commercial or public service enterprises.

**Section 246e** Persons excluded.

(a) *Sections 245-246m of this title shall not apply to:*

(1) Persons employed * * *

(2) *Persons employed by the Government of the United States of America or by the* Government of the Commonwealth of Puerto Rico, with the exception of those agencies or instrumentalities of the latter which operate as private businesses or enterprises; and . . . . (Emphasis supplied)

(3) Persons employed * * *

(b) The provisions of * * *

## STATEMENT OF THE CASE

This case was filed at the Superior Court of Puerto Rico (App. 1a), on October 13, 1982, against a nonappropriated fund instrumentality (NAFI) under the Fair Labor

Standards Act (FLSA) of 1938, as amended, 29 U.S.C. 201, *et seq.*, specifically under section 218(b)(2), and the "most beneficial" laws of the Commonwealth of Puerto Rico for a one-half wage rate beneficial increment over the wage rate of the FLSA for overtime and work performed during meal hours. Because the court of competent jurisdiction of Puerto Rico is a court of general jurisdiction, the source of the jurisdiction and the source of the right of action were not specified in the complaint, though generally indicated therein. (App. 1a) The "most beneficial" laws of Puerto Rico are authorized under the "most beneficial" clause of section 218(a) of the FLSA.

The case was removed to the United States District Court for the District of Puerto Rico (USDC-DPR) on February 4, 1983. A motion to remand filed on February 16, 1983, was denied as per Opinion and Order entered on April 15, 1983 by Judge Juan M. Pérez Giménez. (App. 12a) Review with a petition for a Writ of Mandamus or Certiorari was denied under the doctrine against "piecemeal review." (App. 13a)

The (USDC-DPR) further dismissed the case for alleged want of subject matter jurisdiction and for alleged failure of plaintiffs to state a claim upon which relief could be granted. (App. 23a)

Appeal to the United States Court of Appeals for the First Circuit (USCA-1C) was undertaken, and after intervention by the United States Justice Department of December 13, 1985, the United States conceded that the NAFI is a proper defendant under the FLSA, and that the District Court rather than the Claims Court has jurisdiction over this suit. (App. 34a) The USCA-1C held that "it was error for the district court to dismiss on the ground that plaintiffs were obliged to have brought this action in

the Claims Court against the United States." The Appeals Court further held "that plaintiffs are entitled to proceed in the district court against their immediate employer, the NAFI itself, to the extent of its nonappropriated funds." (App. 33a)

The Court of Appeals, however, held against the plaintiffs that "the case was properly removed pursuant to 28 U.S.C. 1441," (App. 37a) and further dismissed plaintiffs' claim brought under section 218(a) of the FLSA and the "most beneficial" laws of Puerto Rico, App. 40a), but directed the district court to address the merit of plaintiffs' claim under section 218(b)(2) of the FLSA (App. 41a).[1]

## REASONS FOR GRANTING THE WRIT

### A. REMOVAL OF FLSA CASES FROM STATE COURT TO THE UNITED STATES DISTRICT COURTS

#### (1) Conflict among Courts of Appeals

The decision rendered by the USCA-1C is in conflict with the decision given by the United States Court of Ap-

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[1]The uncertainty created by the decision of the Appeals Court in respect to the specificity of plaintiffs' claim under section 218(b)(2) of the FLSA is herein cleared with the affirmation that the plaintiffs' fundamental claim is based on section 218(b)2) for unpaid back wages and overtime, and on section 218(a) for the "most beneficial" increment in the overtime rate to be paid under the laws of Puerto Rico which is one half the regular rate above the maximum payable under the FLSA. The Commonwealth law authorizes payment of work performed during the meal hours at double the regular rate. Because the Superior Court of Puerto Rico is a court of general jurisdiction, no specificity as to jurisdiction and to the legal origin of the cause of action is required. The general mention of the FLSA, though not required, established the fundamental claim under section 218(b)2) for unpaid wages and overtime. The facts alleged in the complaint are pointed in that direction. (App. 40a)

peals for the Eighth Circuit in the case of *Johnson v. Butler Brothers,* 162 F.2d 87 (8th Cir., June 11, 1947).

**(2) The Background of the Johnson Case**

Section 216(b) of the FLSA, in effect since the FLSA was enacted in June 25, 1938 though amended on May 14, 1947, read, on June 11, 1947, substantially as follows:

> "Any employer who violates the provisions of section 6, or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in additional equal amount as liquidated damages. *Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, and such employee or employees may designate an agent or representative to maintain such action for in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the actions."* (Emphasis added)

This legislation brought about a flood of wage and overtime litigation in both, State and Federal district courts as expected, but contrary to the expectation, the flood of litigation was accompanied by the confusion provoked by the removal statute. There was not much confusion as to the jurisdiction of state "courts of competent jurisdiction." That problem was settled very early by *State of Missouri, ex rel St. Louis, Brownsville & Mexico Railway Co. v. Taylor,* 266 U.S. 200, 208 (1924), but the confusion

provoked by the removal statute, still lingers, though the majority of the courts are against removal of FLSA cases.

These courts based their positions against removal, as of June 10, 1947, among other things, on:

(a) That section 216(b) of the FLSA did not constitute the "Constitution or law of the United States" argument raised by the foes of remand. *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451 at 453 (1942).

(b) That section 216(b) of the FLSA constituted the expression of Congress as an exception to the removal statute. (*supra*, underlined) *Apple v. Shulman Publications, Inc.*, 65 F. Supp. 677 (1943) At 678.

(c) That the legislative purpose, in harmony with the prompting impulse of the FLSA, was to grant a broad jurisdiction for the enforcement of the obligations imposed under the Act. *Booth v. Montgomery Ward & Co., supra,* at 455.

(d) That the express amendment of the removal statute was not required to make the legislative purpose effective. *Booth v. Montgomery Ward & Co., supra,* at 456.

(e) That the FLSA clearly shows the intention of Congress to authorize the state courts, as well as the national courts *to hear and determine* questions arising under the Act. *Smith v. Day & Zimmerman,* 65 F. Supp. 209, at 210.

**(3) The Johnson Case**

This case, similar to the one at bar, held that FLSA cases under section 216(b) are not removable from state courts.

Because this case was so important for the proper administration of the FLSA, the Department of Labor of the United States was present as amicus curiae.

Quote from the *Johnson case, supra:*

> **[2]** The right of action created by the Act, being one which arises under a law regulating commerce, may be enforced in a federal district court, regardless of the amount in controversy or of the citizenship of the parties. 28 U.S.C.A., section 41(8).[2] The right may also be enforced in a state court of competent jurisdiction. See State of Missouri ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor, 266 U.S. 200, 208, 45 S.Ct. 47, 69 L.Ed. 247, 42 A.L.R. 1232. The District Court of Crow Wing County, Minnesota, is unquestionably a court of competent jurisdiction.
>
> If Congress had omitted from section 16(b) of the Act the words "in any court of competent jurisdiction," we think the right of the defendant to remove this case to the fedeal court could not successfully be challenged. *Title 28 U.S.C.A., section 71,* authorizes the removal of a "suit of a civil nature * * *, *arising under the * * * laws of the United States * * *, of which the district courts of the United States are given original jurisdiction * * *.*"
>
> *The doubtful question presented is whether Congress, in providing that the right of action created by the Act "may be maintained in any court of competent jurisdiction," intended that an action, if brought in the state court, could be maintained there to final judgment, or intended merely that the action might be maintained in the state court if the defendant saw fit not to remove it. This question as to the intent of Congress has given the federal district courts much difficultly.*

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[2](Cases Omitted).

*The result is that in some districts cases such as this may be removed and in other districts they may not be removed.*[3] For this unfortunate situation the courts are not to blame. It is attributable to the failure of Congress clearly and accurately to express its intent. "To maintain an action or suit *may mean* to commence or institute it; the term imports the existence of a cause of action. * * * *Maintain,* however, is applied to *actions already brought, but not yet reduced to judgment.* * * *. In this connection it means to continue or preserve (persevere) in or with; to carry on. * * *" Black's Law Dictionary, 3rd Ed., 1143. The usual dictionary definition of the work "maintain" is: "To keep up or carry on (as, to maintain an action or undertaking); persevere in; prosecute; also, to keep in existence or continuance * * *."

**[3]** There can be no just criticism of those courts which have concluded that the language used by Congress was inadequate to disclose a clear intent that actions brought in a state court under the Act should not be removable. However, it is our opinion that Congress, in providing that an "*action to recover such liability may be maintained in any court of competent jurisdiction* * * *" and that "The court in such action shall, in addition to any judgment awarded to the plaintiff * * *, allow a reasonable attorney's fee * * * and costs * * *", intended not only that the action might be commenced in any court of competent jurisdiction, but that it could be prosecuted to final judgment in the court in which it was commenced. If that was not the intention of Congress, the

[3](Omitted 19 cases denying removability) (Omitted 8 cases sustaining removability).

words "may be maintained in any court of competent jurisdiction" *merely state a truism and are surplusage.* (Emphasis Added)

We think that the rational construction of section 16(b) is that contended for by the plaintiff and that it does no violence to the removal statute. If Congress intended, as we think it did, that cases such as this should not be subject to removal, *they are excepted from the effect of the removal statute,* which is neither impaired or repealed with respect to cases which properly come within its purview. (Emphasis Added).

There was nothing in the practical situation with which Congress was confronted when it enacted the statute in question which would negative an intent on its part to permit an employee to enforce his right of action in his local state courts. There are many obvious practical considerations which can be urged in support of the probable existence of such a Congressional intent.[4]

**[4]** Our conclusion is that the plaintiff has the right to prosecute his action to final judgment in the District Court of Crow Wing County, Minnesota, and that the United States District Court erred in preventing him from so doing.

**(4) Cases of the post Johnson era**

An examination of the case law will disclose that the district courts of the first, second, third, fourth, sixth and eighth Circuits have based their decisions on the ratio

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[4]Wingate v. General Auto Parts Co., D.C.W.D. Mo., 40 F. Supp. 364, 365; Booth v. Montgomery Ward & Co., D.C.D. Neb., 44 F. Supp., 451, 455, 456.

decidendi of *Johnson v. Butler Bros., supra; Wilkins v. Renault Southwest, Inc.,* D.C. Texas, 227 F. Supp. 647 (1964); *Zorrilla v. Puerto Rican Cement Co.,* D.C., Puerto Rico, 1964, 227 F. Supp. 159; *Maloy v. Friedman,* D.C. Ohio, 80 F. Supp. 290 (1948); *Carter v. Hill & Hill Truck Line, Inc.,* D.C. Texas, 259 F. Supp. 429 (1966); *Rolón v. Flexicore Company of Puerto Rico,* D.C. Puerto Rico, 216 F. Supp. 954 (1963); *Virgilio Avilés et al. v. Commanding Officer,* U.S. Army Command, Fort Buchanan, Puerto Rico, Civil No. 77-211, D.C. Puerto Rico (1977); *Bintrim v. Bruce Merilees Elec. Co.,* D.C. Pa., 520 F. Supp. 1026 (1981).

On the other hand some courts have ruled in favor of removal. See generally *Nishwander v. Paul Hardemann, Inc.,* D.C. Arkansas, 1963, 223 F. Supp. 74; *Buckles v. Morristown Kayo Co.,* D.C. Tenn., 1955, 127 F. Supp. 555; *Rossi v. Singer Sewing Mach. Co.,* D.C. Conn. 1954, 127 F. Supp. 53; *Asher v. William L. Crow Constr. Co.,* D.C. N.Y., 1953, 118 F. Supp. 495; *Hill v. Moss-American, Inc.,* 309 F. Supp. 1175, D.N.D. Mississippi, E.D., February 26, 1970.

**(5) Wilkins v. Renault Southwest, Inc., D.C. Texas, 227 F. Supp. 647 (1964) has provided the basis to settle the confusion**

The *Wilkins* case, *supra,* has provided the settling factor to the confusion initiated by the unsupported claim that enactment of Title 28 in 1948, as it renamed and reworded the old section 71 of the Code into its new designation as 1441, implied the revocation of the *Johnson Case.* To imply that the renaming and the rewording of section 71 into section 1441 revoked the ruling of the *Johnson Case* is far from being justified. The fact that enactment of the new section 1441 occurred a year after the *Johnson Case* is in no way detrimental to its validity as the Law of the Land until this Honorable Court determines otherwise. Section

71 was reworded and redesignated Section 1441 in the overall revision of Title 28 U.S.C. In 1948; but with the 1948 Amendment Congress intended to limit – not to extend – removability.[5]

The *Wilkins Case,* provides us with the irrefutable argument that Congress had considered section 216(b) of the FLSA as a prohibition against removal, hence Congress' inaction in not providing such prohibition in no uncertain terms. Proponents of the contrary view may argue that the reference to this prohibition is "*oblique reference*", *Hill v. Moss-American, Inc., supra,* but the fact remains that since July 11, 1958, to this day, no one has ever produced any 'best evidence' to the contrary. Reference to this prohibition in the *Wilkins case* is contained in 227 F. Supp. at 648, and is herein reproduced from *Senate Report* No. 1830, July 11, 1958, at page 3106, Legislative History, Second Session, 85th Congress, U.S. Code Congressional and Administrative News, 1958, as follows:

> "Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the *Fair Labor Standards Act,* and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, *the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court.* This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's act – that is, *the*

[5]American Fire & Gas Co. v. Fin (1951), 341 U.S. 6, 9-10.

*workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court."* (Emphasis Added).

The arguments leading to, and those of the *Johnson Case* are as valid today as they were in 1947.

The decision against remand entered in the instant case by the USCA-1C contributes to accelerate the confusion prevailing, as it widens the abyss with the ruling of the 8th Circuit in the *Johnson Case.* The conflict between these two Circuits is reviewable under 28 U.S.C. 1254(1), 2101 (c) and rule 19(1)(a) and (b) of this Honorable Court.

Ruling for remand enhances the public policy behind the FLSA.

### B. THE DISMISSAL OF THE SUPPLEMENTAL RIGHT OF ACTION UNDER 218(a) OF THE FLSA

The Appeals Court justified the dismissal of the supplemental claim under section 218(a) of the FLSA on the following:

(1) That the provisions of section 245, et seq. of Title 29 of the Laws of Puerto Rico Annotated (LPRA), minimum wages, and section 271, et seq., overtime hours, overtime rates do not apply to the federal employees in Puerto Rico because:

(a) Persons employed by the Government of the United States in Puerto Rico are specifically excluded from coverage of minimum wage provisions under 29 LPRA 246e.

(b) While statute is *silent* as to federal employees, exclusion from overtime provisions . . . federal employees *were intended* to be exempted as well, and the Department of Labor and Human Resources of the Commonwealth

*saw "no reason"* to include federal employes under the law while excluding Commonwealth employees. (Emphasis Added)

Petitioners most respectfully submit that the position of the Appeals Court is in error.

Title 29 of LPRA has two different and separate Chapters 11 for 29 LPRA 245-246m, to cover Minimum Wage, and 13 for 29 LPRA 271-299 to cover Days and Hours of Work.

The reasons for the separation in two chapters were predicated by the Congressional recognition of the depressed conditions of the economy of Puerto Rico upon enactment of the FLSA in 1938. Congress exempted Puerto Rico from compliance with the minimum wages established by the statute and authorized *lower wages* to be established by industry committees, 29 U.S.C. 206, under the jurisdiction of the state Labor Relations Board. Since the United States Government came under FLSA coverage in a piecemeal fashion, that is, the NAFI employer in 1966, Pub.L. 89-601,[6] and the rest of the United States Government in 1974, Pub.L. 93-259, *the government of Puerto Rico had to exempt,* under Chapter 11, 29 LPRA 246e(a)(2), "all persons working for the Government of the United States in Puerto Rico" *from coverage of the lower minimum wages of Puerto Rico because until 1966, the United States was totally immune from coverage of the FLSA.* In 1966 the NAFI employees were covered by minimum wage and overtime provisions of Section 218(b)(2)

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[6]Section 203(d) of the FLSA also exempted Puerto Rico from coverage since 1938. The amendments of 1966 to the FLSA brought under coverage only employees of the Government of Puerto Rico who worked in a hospital, institution, or certain schools and operators a railway or carrier specified. *Historical note 29 U.S.C.A. 203(d), 1966 Amendments.*

of the FLSA, hence the Puerto Rican exclusion of the NAFIs from the lower minimum wage as part of the federal government, became inoperative by Congressional preemption of the field. The same situation repeated itself through the mandate of Congress in 1974, and the rest of the employees of the federal government fell out of the exclusion of the Puerto Rican law because of preemption of the field by Congress, and the minimum wage to apply is that of the FLSA. (Emphasis Added)

The exclusion was mandatory, not a mere grace of the Puerto Rican legislators.

In contrast with the case of *lower minimum wages* authorized to Puerto Rico by grace of Congress, the *base overtime rate* has been set always by Congress,[7] and *Puerto Rico has been free always,* since 1938, to establish higher overtime rates than those established by Congress in the FLSA by express authority of the "most beneficial" clause of section 218(a) of the FLSA, and Congress would not *excuse* non compliance with those higher overtime rates. Congress, in other words, has preempted the field as far as the *base overtime rate,* and Puerto Rico cannot exempt the NAFI employer since September 1966, and the rest of the persons employed by the rest of the Government of the United States in Puerto Rico, without clashing with the FLSA,[8] and Article VI, Clause 2, of the Constitution of the United States, since April 8, 1974, *Rogers v. Larson,* C.A. Virgin Islands, 1977, 563 F.2d 617, *cert. denied, appeal dismissed,* 439 U.S. 803, *Katherine Gibbs School, Inc. v. F.T.C.,* C.A. 1979, 612 F.2d 658, *rehearing denied,* 628 F.2d 755. This establishes the permanent

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[7]Section 207(a)(1) of the FLSA.

[8]Section 218(b)(2) of the FLSA.

overtime rate of the FLSA as a base rate applicable to the NAFI employer and to the employees. (Emphasis Added)

In respect to the supplemental overtime increment above the FLSA rate under the "most beneficial" laws of Puerto Rico,[9] these are applicable to the NAFI respondents and its employees because the 1966 Amendment to the FLSA equated the NAFI employer,[10] respondent in this case, with its counterpart *enterprise* in the non-military community. It is clear that they do not qualify as *industry* covered by the FLSA (and subject only to the FLSA overtime rate under the underlined proviso of 29 LPRA 274). The overtime rate payable by the NAFI respondent is twice the regular rate,[11] and this rate has been applicable to the private enterprise, the latter equated through the FLSA to the NAFI respondent since 1966, has been in effect for at least thirty-one years, *Laborde v. Eastern Sugar Associates,* 1959, 81 PRR 478; *Maldonado v. International Business Machines Corp.,* D.C. Puerto Rico, 1972, 56 F.R.D. 452, *Doctor's Hospital, Inc. v. Silva Recio,* D.C. Puerto Rico, 1975, 429 F. Supp. 560, affirmed 558 F.2d 619, 1977; *Webster v. Bechtel,* 1980, 621 P.2d 890; and *Peña v. Eastern Sugar Associates,* 1953, 75 PRR 288, affirmed 222 F.2d 934, certiorari denied, 350 U.S. 900 (1955).

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[9]29 LPRA 285, fourth paragraph.

[10]Section 203(d), Employer. This Section remained intact with the Amendments of 1966 to the FLSA, with the exception of minor additions. No changes were introduced to distinguish the NAFI employer from its counterpart in the civilian economy. Historical Note 29 USCA 203(d), 1966 Amendment.

[11]The respondents sell merchandise and services; they do not produce goods; further, Mandatory Decree 47, revision of 1978, prepared by the Commonwealth of Puerto Rico under the authority of Section 206 of the FLSA, requires payment of overtime at twice the regular rate by enterprises as the NAFIs.

The base upon which the respondents base their claim of exemption, that is, 29 LPRA 246e(a)(2), is no longer available to them, and it was error for the Court of Appeals to dismiss the supplemental claim under 29 U.S.C. 218(a) on such basis. We know, and the Court so expressed, that section 246e(a)(2) is a minimum wage legislation in the Puerto Rican law. We further know that since February 19, 1985, with the case of *Joe G. García v. San Antonio Metropolitan Transit Authority, et al.*, 53 LAW WEEK 4135, 105 S. Ct. 1005 (1985), the government of Puerto Rico is no longer exempt from payment of minimum wages. Hence to brandish that obsolete law to claim "intent" in 29 LPRA 285 is to force an argument invalid from the very source.

Further, to legislate to include the United States in Section 285 of Chapter 13 of Title 29 of LPRA is a responsibility of the Legislature of the Commonwealth, and to legislate by inference or otherwise by Courts, or by individuals in positions of the Executive Branch to accomplish the same, is a violation to the separation of powers, which was so vehemently repudiated by the forefathers of the Constitution of the Land. The "silence" referred to by the Court of Appeals was forced upon the legislator of Puerto Rico by express mandate of Congress in the FLSA, there being no silence in 29 LPRA 285 to interpret.

## CONCLUSION

a. That the U.S. Court of Appeals for the First Circuit erred as it affirmed removal of this case as authorized by the District Court for the District of Puerto Rico, in violation of law and jurisprudence.

b. That the U.S. Court of Appeals for the First Circuit erred when it affirmed dismissal of the supplemental cause

of action of petitioners under the "most beneficial" laws of Puerto Rico as authorized by the FLSA under Section 218(a).

WHEREFORE for the foregoing reasons, and as a matter of public policy, this Honorable Supreme Court should reverse the decision of the U.S. Court of Appeals for the First Circuit and remand the case to the Superior Court of Puerto Rico with instructions to apply the "most beneficial" laws of Puerto Rico authorized by Section 218(a) of the FLSA.

At San Juan, Puerto Rico, this 31st day of May, 1986.

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